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No.

In The

Supreme Court

of the United States

October Term, 1996

TAYLOR EQUIPMENT, INC., DOING BUSINESS AS MIDCON EQUIPMENT COMPANY,

Petitioner,

v.

JOHN DEERE COMPANY; JOHN DEERE INDUSTRIAL EQUIPMENT COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit properly held as a matter of law that under South Dakota law a franchisor has no duty to act reasonably in deciding whether to consent to a proposed dealership transfer where:

(1) two different U.S. District judges sitting in the district of South Dakota had previously concluded that under the implied covenant of good faith and fair dealing there is such a duty under South Dakota law;

(2) the South Dakota law being interpreted is a portion of the Uniform Commercial Code which code has been enacted in fifty-one jurisdictions and which law is common to those jurisdictions;

(3) the Eighth Circuit's narrow interpretation of the franchisor's obligation of good faith and fair dealing in dealership transfers under the Uniform Commercial Code is in direct conflict with the interpretation of the Tenth Circuit as set forth in *Larese v. Creamland Dairies, Inc.*, 767 F.2d 716 (10th Cir. 1985), is contrary to interpretations of the Second Circuit, Sixth Circuit and District Court circuits and effectively denies Taylor the right of trial by jury guaranteed by the Constitution of the United States, Amendment VII.

PARTIES TO THE PROCEEDING

Plaintiff: Taylor Equipment, Inc., f/k/a Taylor Equipment Rental Company, Inc., d/b/a Midcon Equipment Company and Paul and Cecilia Taylor, its shareholders.

Defendants: Deere & Company, a publicly-held corporation incorporated under the laws of the State of Delaware, and John Deere Industrial Equipment Company, a wholly owned subsidiary of Deere & Company, and also incorporated in Delaware. Deere states in its Certificate of Interested Parties filed in the United States Court of Appeals for the Eighth Circuit: Neither Deere & Company nor John Deere Industrial Equipment Company have parent companies, subsidiaries, or affiliates which have issued shares to the public in the United States of America.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Taylor Equipment, Inc., respectfully prays that a writ of certiorari issue to review

the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on October 18, 1996 in order to resolve the conflict between the Eighth and Tenth Circuit Courts of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion and judgment of the Eighth Circuit Court of Appeals, dated October 18, 1996 was reported. A copy of the opinion is reproduced in the Appendix at p. 1a. By order filed November 26, 1996, the Eighth Circuit denied the petition for rehearing and suggestion for rehearing en banc. Appendix at p. 46a. The transcript of the Opinion of the U.S. District Court for the District of South Dakota (Jones, J.) rendered from the bench on September 13, 1993 is reproduced in the Appendix at p. 35a. The Memorandum Opinion and Order, dated October 14, 1994 of the United States District Court for the District of South Dakota (Piersol, J.) was not reported and is reproduced in the Appendix at p. 37a. The District Court's Order on Post-Trial Motions and Directing Entry of Final Judgment on Count III was entered on June 26, 1995. A copy is reproduced in the Appendix at p. 29a.

JURISDICTION

On May 5, 1995, the Clerk of the United States District Court for the District of South Dakota entered a partial judgment following a jury verdict in favor of Taylor Equipment, Inc. Deere filed extensive post-trial motions. The District Court overruled Deere's post-trial motions and directed entry of final judgment in favor of Taylor on June 26, 1995. On July 24, 1995, Deere filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit, which held that as a matter of law Taylor Equipment had no right to trial on the issues of whether Deere had acted in good faith when it refused to approve Interstate as a purchaser for Taylor. The Eighth Circuit reversed the jury verdict in an opinion filed on October 18, 1996. On November 22, 1996, the Eighth Circuit denied Taylor's timely-filed Motion for Certification of a Question of Law and Application for a Stay of Mandate. On November 26, 1996, the Eighth Circuit denied Taylor's timely-filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Uniform Commercial Code 1-203 enacted as SDCL 57A-1-203:

> Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement.

Uniform Commercial Code 1-201(19) enacted as SDCL 57A-1-201(19):

> 'Good faith' means honesty in fact in the conduct or transaction concerned.

Uniform Commercial Code 2-103(1)(b) enacted as SDCL 57A-2-103(b)(1):

> 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

STATEMENT OF THE CASE

For nearly thirty years, Paul Taylor operated a franchised John Deere Industrial Equipment Dealership known as Midcon Equipment in two locations. In 1990, Taylor sold the dealership located in Sioux City, Iowa to Swaney Equipment, an Iowa corporation, and the dealership located in Sioux Falls, South Dakota to Midwest Equipment Co., a Minnesota corporation. Prior to these sales, Taylor had negotiated a sale of the entire dealership in both locations to Interstate Companies, a Minnesota corporation with Deere dealerships in Iowa and Montana. Deere refused to approve the transfer of the franchises to Interstate. The sale price to Interstate exceeded the price obtained from the subsequent purchasers by $1,715,000.

Taylor sued Deere alleging six causes of action including wrongful termination under South Dakota franchise law and breach of the implied contractual obligation of good faith and fair dealing under South Dakota's enactment of the Uniform Commercial Code. Deere moved for summary judgment on all causes of action. After considerable argument, the District Court for the District of South Dakota granted Deere's motion on all causes of action except for Taylor's contract claim that under the U.C.C. enacted in South Dakota, Deere had an obligation to act in good faith and deal fairly in approving Taylor's successor. The district court rejected Deere's argument that the contracts provision that the dealership could not be assigned "without the prior written consent of [Deere]" gave Deere an absolute right of refusal.

When the case was reassigned to another district judge, Deere renewed its motion for summary judgment on Taylor's claim for breach of the obligation of good faith and fair dealing in refusing to approve the sale to Interstate. The second South Dakota district judge extensively analyzed the law on the implied covenant of good faith and fair dealing, noted that a high level Deere employee had promised to deal fairly with Taylor in the circumstances and concluded thatTaylor "had a reasonable expectation that defendant would exercise good faith and fair dealing in making its decision as to whether dealership agreements could be transferred." (Appendix p. 44a).

For three weeks in March, 1995, the case was tried to a jury on the narrow factual issue of whether Deere had acted in good faith in refusing to approve Taylor's proposed transfer to Interstate. The jury concluded that Deere had not acted fairly and reasonably and awarded Taylor damages.

Deere filed post-trial motions again arguing that as a matter of law, there was no cause of action because of the language in the franchise agreement giving Deere the right to approve a transfer. The district court adhered to its earlier rulings. Deere appealed to the United States Court of Appeals for the Eighth Circuit. In its brief, Deere argued that based on the contract language as a matter of law, Taylor could not prevail. Taylor relied on the extensive analysis of the South Dakota case law set forth by the district court and on *Larese*, a case on all fours, factually, decided by the Tenth Circuit.

The United States Court of Appeals for the Eighth Circuit in a split decision reversed the jury verdict holding that "the implied covenant cannot override [the] express term of the contract...." (Opinion p. 2, Appendix p. 2a). The court stated that it disagreed with the conclusion of the Tenth Circuit in *Larese*. (Opinion p. 11, Appendix p. 15a).

Taylor filed a Motion for Certification of a Question of Law to the South Dakota Supreme Court. The Eighth Circuit denied certification of the question on November 22, 1996. Taylor timely filed a Motion for Rehearing with Suggestions for Rehearing En Banc which the Eighth Circuit denied on November 26, 1996. Taylor filed this Petition for Writ of Certiorari on February 14, 1997.

Federal jurisdiction in the district court was based on 28 U.S.C. § 1332.

REASONS FOR GRANTING THE WRIT

(1) THE QUESTION OF WHETHER A FRANCHISOR HAS A DUTY TO ACT WITH GOOD FAITH AND IN A COMMERCIALLY REASONABLE MANNER WHEN A FRANCHISEE SEEKS TO TRANSFER HIS RIGHTS UNDER A FRANCHISE AGREEMENT IS OF GENERAL PUBLIC IMPORTANCE.

In order to get into business, dealers, distributors and franchisees are typically required to sign standard form contracts drafted by their manufacturers, suppliers,

or franchisors. The dealer or franchisee has no opportunity nor any real power to bargain or negotiate any of the contract terms.

Since the enactment and adoption of the Uniform Commercial Code, the covenant of good faith and fair dealing contained therein has been the most effective remedy to protect dealers and franchisees against overreaching and unreasonable conduct by their franchisors. The franchisor is in pursuit of his own economic interest and has little regard for the substantial investments of time and money made by the dealer to make the business relationship successful for both parties. The great majority of the disputes are heard in federal courts because of the diversity of citizenship between franchisor and franchisee. The interpretation of the implied covenant of good faith and fair dealing is a question of exceptional importance and widespread commercial application. It is a public policy issue for the thousands of people who pursue their livelihood in franchised businesses. The only retirement asset many dealers have after years of marketing manufacturers' products is the ability to sell their business at its fair value. If a manufacturer can arbitrarily void a sale to a purchaser, there is no protection for the dealers.

The interpretation of the implied covenant of good faith and fair dealing is a question of exceptional importance and widespread commercial application. It is a public policy issue for the thousands of people who pursue their livelihood in franchised businesses. The only retirement asset many dealers have after years of marketing manufacturers' products is the ability to sell their business at its fair value. If a manufacturer can arbitrarily void a sale to a purchaser, there is no

protection for the dealers.

(2) THE DECISION OF THE EIGHTH CIRCUIT ON THIS ISSUE IS IN DIRECT CONFLICT WITH THE DECISION OF THE TENTH CIRCUIT AND IS FURTHER CONTRARY TO DECISIONS OF THE SECOND CIRCUIT, THE SIXTH CIRCUIT, AND THE D.C. CIRCUIT. THE EIGHTH CIRCUIT DECISION EFFECTIVELY DENIES A PLAINTIFF THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL ON AN ISSUE WHICH WOULD BE TRIABLE TO A JURY IN THE TENTH, SECOND, SIXTH AND DISTRICT COURT CIRCUITS.

The Eighth Circuit majority opinion effectively eliminates the covenant of good faith and fair dealing from the franchise relationship when a dealer or franchisee seeks to transfer his rights under the franchise agreement. The Eighth Circuit opinion holds that if the franchise contains language granting the franchisor the right to approve franchise assignments and transfers, that right is absolute and that as long as the franchisor acts honestly, his refusal may be unreasonable, arbitrary and capricious. The majority opinion precludes a jury trial on the factual issues of what constitutes good faith contrary to other circuits that have analyzed the same or similar issues. Judge Gibson filed a vigorous dissent noting that two South Dakota district courts had concluded that a jury issue existed and that the analysis of the South Dakota case law "supports the district court's reference to *Larese* contrary to the extended

arguments made by the court today." (Opinion p. 20-22, Appendix p. 27a).

The United States Court of Appeals for the Tenth Circuit in *Larese v. Creamland Dairies, Inc.*, 767 F.2d 716 (10th Cir. 1985), with facts virtually identical to those in the instant case, reached the conclusion that a franchisee was entitled to trial by jury in the same circumstances. In *Larese*, The plaintiffs had entered into a franchise contract agreement with defendant which provided that franchisee shall not assign, transfer or sublet this franchise, or any of [the] rights under this agreement, without the prior written consent of Area Franchisor [Creamland] and Baskin Robbins, any such unauthorized assignment, transfer or subletting being null and without effect.

Plaintiffs attempted to sell their business and Creamland refused to consent to the franchise transfer. Plaintiffs sued. The district court granted summary judgment holding that contract gave defendant an absolute, unqualified right to refuse to consent to proposed sale of franchise rights. Plaintiffs appealed.

The Tenth Circuit framed the issue:

> Whether a franchisor has an absolute right to refuse to consent to the sale of a franchisee's interest to another prospective franchisee.

Id. at 716.

The circuit court analyzed the issue in light of the

obligation of good faith. The Tenth Circuit held:

> [T]he franchisee has invested time and money into the franchise and, in doing so, has created benefits for the franchisor. We do not find it an excessive infringement of the franchisor's rights to require that the franchisor act reasonably when the franchisee wants out of the relationship. The franchisee should not be forced to choose between losing its investment or remaining in the relationship unwillingly when it has provided a reasonable alternative franchisee. We do not hold that a provision which expressly grants to the franchisor an absolute right to refuse to consent is unenforceable when such an agreement was freely negotiated. We do not believe the Colorado courts would find such an absolute right, however, in a provision such as the one involved in this case which provides simply that the franchisee must obtain franchisor consent prior to transfer.

Id. at 717-718.

Other circuits that have addressed essentially the same issue follow the reasoning of *Larese*. These circuits have also expressed the view that provisions such as the assignment clause in the *Taylor* case do not give franchisors unfettered discretion to make unreasonable decisions and that the issue of whether conduct is taken in good faith is a jury question.

In *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984) an employee whose compensation was determined largely by commissions on sales made above quotas set by his employer sued his employer for retroactively raising his quota at the end of a successful year, thereby reducing his compensation. The employment contract provided that "management reserves the right to change [the quota] at any time...within their sole discretion." *Id.* at 1150. Judge (now Justice) Scalia, writing for the D.C. Circuit, upheld an implied duty of good faith despite the clear contract terms:

> ...[W]e must reject at the outset the proposition...that as to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct...(citations omitted)..."it is possible to so draw a contract as to leave decisions absolutely to the uncontrolled discretion of one of the parties and in such a case the issue of good faith is irrelevant" (citation omitted). But the trick is to tell when a contract has been so drawn — and surely the mere recitation of an express power is not always the test...But to say that every expressly conferred contractual power is of this nature is virtually to read the doctrine of good faith...out of existence.

Id. at 1153-54.

In *Davis v. Sears Roebuck & Co.*, 873 F.2d 888 (6th Cir. 1989), the Sixth Circuit, on facts extremely similar

to those present in this case, held that Sears, which encouraged Davis to sell his business even after Sears had acted to terminate for cause, was correctly found by the jury to have breached its implied duty of good faith by refusing to approve the prospective purchasers presented by Davis. In support of its holding, the Sixth Circuit stated:

> In this case, Sears alone had the right to determine the then existing standards governing selection of catalog merchants and whether any of the Davis-referred applicants satisfied those standards. Although Sears' right is undisputed, Sears, nevertheless, must exercise its unilateral right in good faith. That is, Sears could not feign dissatisfaction with the applicants referred by Davis so as to, for example, deprive him of the best price for his business.

Id. at 897 (emphasis added) (citations omitted).

The Sixth Circuit observed that, while Sears put forth evidence that the prospective purchasers did not meet Sears' selection standards, Davis had also presented evidence that the purported standards were a pretext, such that "the issue of Sears' good faith in failing to approve any of the Davis-referred applicants as the Merchant properly was placed before the jury." *Id.*

Finally, in *Carvel Corp. v. Diversified Management Group, Inc.*, 930 F.2d 228 (2nd Cir. 1991), the Second Circuit held, in a franchise case, that the district court

erred in failing to give a separate instruction on the duty of good faith--an instruction that would parallel that given by the district court here. In *Carvel*, the franchisor had contracted with the franchisee for the development of a number of stores in the Mid-Atlantic states. The contract gave the franchisor discretion to set terms and requirements such as store layout, location and the like. The franchisor later sued the franchisee for non-payment of certain obligations and the franchisee counterclaimed, alleging that the franchisor had unreasonably changed terms of wholesale sales, store blueprints, site selection criteria and other items necessary for store development. After a verdict for the franchisor, the Court of Appeals reversed:

> Since the contract gave Carvel considerable discretion with regard to matters like advertising campaigns, store location and wholesale sales, the jury, as instructed, could have mistakenly believed that Carvel was not in breach because it had near absolute control over these matters. However, even if it acted within the bounds of its discretion, Carvel would be in breach if it acted unreasonably.

Id. at 231 (emphasis added). The Second Circuit thus held that the franchisee was entitled to a retrial with the jury instructed separately that Carvel had a duty to act fairly and reasonably. *Id.*

(3) THE UNIFORM COMMERCIAL CODE IS STATUTORY LAW IN FIFTY-ONE JURISDICTIONS. THE COURT'S GUIDANCE IS NEEDED ON THE SCOPE OF A FRANCHISOR'S OBLIGATION OF GOOD FAITH AND FAIR DEALING WHEN A FRANCHISEE SEEKS TO TRANSFER FRANCHISE RIGHTS TO ESTABLISH A CONSISTENT STATUTORY INTERPRETATION AND TO SECURE UNIFORMITY AMONG THE JURISDICTIONS.

The issue presented in this case would clearly be a jury issue in the Tenth, Second, Sixth and District Court circuits. The obligation of good faith and fair dealing grounded in the Uniform Commercial Code is uniform law in the various jurisdictions. The franchise contract sought to be interpreted here is standard in all jurisdictions. Only the Eighth Circuit has interpreted the law to preclude the right to a jury trial on the issue of good faith. In the interests of uniformity and commercial fairness, this Court should hold that juries have a right to decide whether the covenant of good faith and fair dealing has been breached in the context of a case like the instant case, where evidence is presented of commercially unreasonable conduct by a franchisor.

CONCLUSION

The reasoning of the Eighth and Tenth Circuits creates conflicting results on virtually identical facts. In *Larese*, the Tenth Circuit concluded that a franchisor has a duty to act in a commercially reasonable manner and with good faith when a franchisee seeks to transfer its rights under a franchise agreement; in the instant case, the Eighth Circuit concluded that a franchisor , if it acts honestly, has an unrestricted right to withhold approval of such a transfer. Other circuits when addressing issues of "express" contractual terms in view of the obligation of good faith have followed the reasoning of *Larese*. The conflict is clear. Certiorari should be granted.

Respectfully submitted,

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No. 95-2937
No. 95-3000

Taylor Equipment, Inc., doing business as Midcon Equipment Company,

Plaintiff-Appellee/
Cross Appellant,

v.

John Deere Company; John Deere Industrial Equipment Company,

Defendants-Appellants/
Cross Appellees.

Appeal from the United States District Court for the District of South Dakota.

Submitted: June 12, 1996

Filed: October 18, 1996

Before LOKEN, J. GIBSON, and HANSEN, Circuit Judges.

LOKEN, Circuit Judge.

Deere & Company (formerly John Deere Co.) and its subsidiary, John Deere Industrial Equipment Company (collectively, "Deere"), appeal a judgment in favor of Deere's former industrial equipment dealer, Midcon Equipment Company ("Midcon"). The judgment was entered after a jury found that Deere breached the implied covenant of good faith and fair dealing when it refused to approve Midcon's proposed assignment of its dealership to a willing buyer, forcing Midcon's owners to sell the business to other approved buyers for $1,715,000 less. The dealer contract provided that Midcon could not assign its dealership "without the prior written consent of [Deere]." Because the implied covenant cannot override this express term of the contract, and because there was no proof that Deere failed to exercise "honesty in fact," we reverse.

I. Factual Background.

Deere manufactures construction and industrial equipment which it sells to independent dealers who sell or lease the equipment to end users. Deere dealers buy and sell parts and used equipment and service customer equipment. Because construction and industrial equipment is expensive, Deere provides its dealers "floor plan" financing -- the dealer must take title to a piece of equipment, such as a $100,000 road grader, upon its delivery into inventory, but the dealer does not pay Deere until it sells or leases the equipment, and it pays no interest on this credit transaction for the first nine months after delivery. Given this financial stake in its dealers, Deere screens prospective dealers for financial strength and adequate capitalization.

Midcon was a long time Deere dealer in Sioux Falls, South Dakota, and Sioux City, Iowa. This controversy began in 1990 when Deere discovered that Midcon had sold $370,000 in equipment "out of trust" by failing to timely pay Deere after the sales. The dealer contract between Deere and Midcon provided that Deere could terminate immediately for cause (defined to include defaults such as selling equipment out of trust), and that either party could terminate without cause upon one hundred twenty days written notice. Deere notified Midcon's owners, Paul and Cecelia Taylor, that Midcon would be terminated because of these serious defaults. However, in lieu of immediate termination, Deere advised that it would allow Midcon to continue as a dealer in good standing for up to eighteen months while the Taylors attempted to locate a buyer.

The contract further provided that it "cannot be assigned by the Dealer without prior written consent of [Deere]."

In the fall of 1991, Midcon entered into an "agreement in principle" to sell nearly all its assets to Interstate Companies of Minnesota, Inc. ("Interstate"). This tentative agreement was subject to a number of contingencies, including Deere's consent to the assignment of Midcon's dealer rights to Interstate. Though Deere had approved Interstate's acquisitions of Deere dealers in Montana and Des Moines, Iowa, in 1987 and 1989, Deere notified Interstate that it would not approve this assignment unless Interstate enhanced its financial strength with additional equity capital. Interstate declined to do so, Deere refused to approve the

assignment, and Midcon's sale to Interstate fell through. In 1992, with Deere's approval of the purchasers as successor dealers, the Taylors sold most of Midcon's Sioux Falls assets to Midwest Machinery, Inc. ("Midwest"), and most of the Sioux City assets to Swaney Equipment Co. ("Swaney"), on substantially less favorable terms than Interstate had previously offered.

II. Procedural History.

Midcon then commenced this action, alleging wrongful cancellation under the South Dakota equipment dealer statute, S.D.C.L. §§§§ 37-5-3 and 4, and breach of the implied covenant of good faith and fair dealing, when Deere refused to approve the assignment to Interstate. Deere counterclaimed, alleging that Midcon had fraudulently obtained government customer discounts.

The district court summarily dismissed Midcon's wrongful cancellation claim because the dealership was not cancelled, but it denied Deere summary judgment on the breach of covenant claim. Prior to trial of that claim, the court severed Deere's fraud counterclaim for separate trial. It also granted Midcon's motion in limine to preclude evidence regarding Midcon's sales out of trust and Deere's intended termination on the ground that this evidence was irrelevant and unfairly prejudicial after dismissal of the wrongful cancellation claim. The court ruled that the sole issue at trial would be whether Deere acted in good faith when it refused to approve assignment of Midcon's contract to Interstate.

Although Deere had not told Paul Taylor why it refused to approve the proposed assignment,[1] discovery revealed Deere correspondence conditioning approval on Interstate agreeing to enhance its equity capital. At trial, Midcon's theory was that this demand was pretextual -- in fact, Deere had forced Midcon tosell its businesses to two "key dealers," Midwest and Swaney, to further Deere's secret plan to "rationalize" its dealer network by eliminating fifty to one hundred small dealers during the 1990's. Deere countered that the refusal was in fact based upon its good faith, rational concern over Interstate's financial ability to expand in this fashion. Midcon responded with evidence that Deere's equity capital demand was unusual and unreasonable. The jury obviously credited Midcon's pretext theory.[2]

---

[1] When pressed by Taylor, Deere representatives told him to ask Interstate why it was not approved. This was an appropriate response since Deere's communications with Interstate had involved that company's confidential financial information.

[2] Early in the trial, Paul Taylor testified: "when Deere had put a certain amount of pressure on me, I decided that I would sell the business." Deere argued that Midcon thereby opened up the issue of its sales out of trust, but the district court adhered to its earlier motion in limine ruling. This ruling left the jury free to infer that Deere "pressured" Taylor as part of its secret plan to eliminate small dealers, not because Midcon had breached its dealer contract. The ruling also precluded Deere from explaining why Taylor did not have the option of refusing to sell the business if he found the Midwest and Swaney purchase offers unattractive. Finally, the ruling foreclosed Deere from

The jury awarded Midcon $1,715,710 in compensatory damages. The district court awarded $381,240.55 in prejudgment interest and denied Deere's alternative motions for judgment as a matter of law or a new trial. On appeal, Deere argues (1) it is entitled to judgment as a matter of law on Midcon's implied covenant claim; (2) the district court erred in excluding evidence of Midcon's sales out of trust and government discount fraud, and Interstate's subsequent financial woes; (3) error in the jury instruction on "good faith"; and (4) improper damages. In its conditional cross-appeal, Midcon argues that we should reinstate the claim for wrongful cancellation if we reverse the judgment for breach of the implied covenant. Given our interpretation of controlling South Dakota law,[3] we need only address the first and last issues.

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putting its own actions in context, which is critical when a party's "honesty in fact" is at issue. Indeed, the district court even barred Deere from introducing evidence of Interstate's later financial troubles, evidence that would have substantiated the concerns that Deere contended were the reason for its refusal to approve assignment of the Midcon dealerships to Interstate. These evidentiary rulings left Deere to defend a claim of bad faith with one hand tied behind its back. Had we not concluded that Midcon's breach of covenant claim fails as a matter of law, we would have reversed and remanded for a new trial on this ground.

[3] Neither party challenges the district court's decision to apply South Dakota law, and we do not examine that issue sua sponte. See Kostelec v. State Farm Fire & Cas. Co., 64 F.3d 1220, 1224 (8th Cir. 1995).

III. The Implied Covenant Claim.

The district court concluded that "the South Dakota Supreme Court would impose on [Deere] a duty to act reasonably in deciding whether to consent to a proposed dealership transfer." We review the court's construction of state law de novo. See Pate v. National Fund Raising Consultants, Inc., 20 F.3d 341 (8th Cir. 1994). Application of the implied covenant is a matter of contract interpretation, Cambee's Furniture, Inc. v. Doughboy Rec., Inc.,825 F. 2d 167, 175 (8th Cir. 1987) (applying South Dakota law), a question we also review de novo. Dirks v. Sioux Valley Empire Elec. Ass'n, Inc., 450 N.W.2d 426, 427-28 (S.D. 1990).

A.

The Supreme Court of South Dakota recently held that South Dakota law implies a covenant of good faith and fair dealing into every contract. See Garrett v. BankWest, Inc., 459 N.W.2d 833, 841 & n.7 (S.D. 1990). This covenant affords only contract remedies; there is no independent tort for its breach. Moreover, "good faith is not a limitless duty or obligation. The implied obligation must arise from the language used [in the contract] or it must be indispensable to effectuate the intention of the parties." Id. at 841-42 (quotation omitted). The Court in Garrett adopted for all contracts the definition of "good faith" found in South Dakota's uniform commercial code -- "honesty in fact in the conduct or transaction concerned." S.D.C.L. §§ 57A-1-201(19).

Though every contract includes the implied covenant, it does not affect every contract term. The covenant is "a method to fill gaps" in a contract. It has "nothing to do with the enforcement of terms actually negotiated" and therefore cannot "block use of terms that actually appear in the contract." Continental Bank, N.A. v. Everett, 964 F.2d 701, 705 (7th Cir.), cert. denied, 506 U.S. 1035 (1992). Where parties have addressed an issue in the contract, "no occasion to divine their intent or supply implied terms arises." Cambee's, 825 F.2d at 175 n.13.

In Garrett, the Court declined to apply the implied covenant to compel a lender to extend credit when the contract's express terms did not require such action. 459 N.W.2d at 847. Similarly, that Court has refused to "transplant[] the covenant of good faith and fair dealing into the foreign soil of the employment-at-will doctrine." Breen v. Dakota Gear & Joint Co., 433 N.W.2d 221, 224 (S.D. 1988). A claim that an employee was terminated in bad faith is fundamentally inconsistent with the concept of at-will employment. Therefore, the implied covenant may not be used to restrict the employer's freedom to terminate. See Poff v. Western Nat'l Mut. Ins. Co., 13 F.3d 1189, 1191 (8th Cir. 1994) (applying the same principle in Minnesota law).

Applying similar reasoning, many courts have held that the implied covenant may not be applied to limit a clear contractual provision allowing termination of the contract without cause. See Grand Light & Supply Co., Inc. v. Honeywell, Inc., 771 F.2d 672, 675, 679 (2d Cir. 1985); Triangle Min. Co. v. Stauffer Chem. Co., 753 F.2d 734, 739-40 (9th Cir. 1985); Cardinal Stone Co.

v. Rival Mfg. Co., 669 F.2d 395, 396 (6th Cir. 1982); Corenswet, Inc. v. Amana Refrig., Inc., 594 F.2d 129, 138 (5th Cir.), cert. denied, 444 U.S. 938 (1979); Blalock Mach. & Equip. Co. v. Iowa Mfg. Co., 576 F. Supp. 774, 776-78 (N.D. Ga. 1983). See also General Aviation, Inc. v. Cessna Aircraft Co., 703 F. Supp. 637, 644 (W.D.Mich. 1988) (implied covenant may not restrict a party's right to refuse to renew an annual dealer agreement), rev'd in part on other grounds, 915 F.2d 1038 (6th Cir. 1990). The Deere-Midcon dealer contract was terminable by either party without cause. This suggests that Deere's right to disapprove an assignment of the contract was intended to be absolute, because Deere in any event would be free to terminate an unwanted successor without cause.[4]

This appeal involves a no-assignment-without-approval clause, rather than a termination clause. However, courts have also been reluctant to apply the implied covenant to block a party's exercise of its contractual right to withhold approval. In James v. Whirlpool Corp., 806 F. Supp. 835, 839 (E.D. Mo. 1992), for example, the contract provided that "[n]one of the rights or obligations under th[e] agreement shall be subject to assignment . . . without the prior

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[4] In Cambee's, we held that a distributor contract silent as to duration contained an implied covenant that the distributor would not be terminated without cause "for a period sufficient to allow [the distributor] to recoup its investment." 825 F.2d at 175. However, the Deere-Midcon agreement was not silent as to duration. Moreover, Midcon had many years as a Deere dealer in which to recoup its initial investment.

written consent of [the manufacturer]." The court held that the implied covenant did not "override the express terms of the agreement" which "unmistakably" granted an unlimited right to disapprove assignments. Id. at 843-44. See also In re Bellanca Aircraft Corp., 850 F.2d 1275, 1285 (8th Cir. 1988) (U.C.C. good faith obligation imposes no duty not to unreasonably withhold consent to assign a contract right).

Similarly, in Hubbard Chevrolet Co. v. General Motors Corp., 873 F.2d 873, 877-78 (5th Cir.), cert. denied, 493 U.S. 978 (1989), the court held that the implied covenant had "no role to play" in a dispute over the manufacturer's refusal to approve a dealer's relocation. "[The contract] gave GM the authority to approve or disapprove relocation for its own reasons," the court explained; "we decline to allow a jury to reevaluate the wisdom of the parties' choice to leave relocation decisions to GM." Id. at 878. See also Tidmore Oil Co. v. BP Oil Co., 932 F.2d 1384, 1391 (11th Cir.) (no breach of the implied covenant where supplier refused to approve a jobber's expansion under a contract stating that the supplier "must approve each outlet"), cert. denied, 502 U.S. 925 (1991).

Were the Supreme Court of South Dakota to apply the holdings in these cases to this fact setting, it is clear that Midcon's implied covenant claim would fail as a matter of law. The purpose of the implied covenant is to honor the parties' justified expectations. Garrett, 459 N.W.2d at 846. Absent contractual limitation, Deere has an absolute right to choose its equipment dealers. Midcon's dealer contract granted Deere an express, unrestricted right to disapprove a proposed assignment of

Midcon's contract rights.[5] This contract term gave Midcon no justified expectation that Deere was agreeing to surrender its absolute right to choose Midcon's successor. Instead, the no-assignment-without-Deere-approval term preserved that right.[6] Cf. Massey v. Tandy Corp., 987 F.2d 1307, 1309-10 (8th Cir. 1993); Abbott v. Amoco Oil Co., 619 N.E.2d 789, 796 (Ill. App.) ("the dealers cannot complain when Amoco merely exercises the discretion the dealers allowed Amoco to possess"), appeal denied, 624 N.E.2d 804 (Ill. 1993).

B.

There is another line of cases that suggest some role, albeit a limited role, for the implied covenant in a dispute involving exercise of a contractual right to

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[5] See Cunningham Implement Co. v. Deere & Co., No. C7-95-1148, 1995 WL 697555 (Minn. App., Nov. 28, 1995) (unpublished): "Deere left nothing to implication . . . . [Denial of approval] was Deere's contract right."

[6] The provision is consistent with general contract principles in that it confirms the parties' understanding that Midcon's rights as a Deere dealer fell within the broad class of contract rights that are not assignable without the other party's consent because "they are coupled with liabilities, or ...involve a relationship of personal credit and confidence." Green v. Camlin, 92 S.E.2d 125, 127 (S.C. 1956); see Berliner Foods Corp. v. Pillsbury Co., 633 F. Supp. 557 (D. Md. 1986); Jennings v. Foremost Dairies, Inc., 235 N.Y.S.2d 566, 573 (N.Y. Sup. Ct. 1962) (dealer contract).

disapprove assignment of a dealer contract. In Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990), the court explained: "'Good faith' is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of [the contract's] drafting, and which therefore was not resolved explicitly by the parties." The Seventh Circuit further explained this concept in Original Great Amer. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992):

> Contract law imposes a duty, not to "be reasonable," but to avoid taking advantage of gaps in a contract in order to exploit the vulnerabilities that arise when contractual performance is sequential rather than simultaneous. Suppose A hires B to paint his portrait to his satisfaction, and B paints it and A in fact is satisfied but says he is not in the hope of chivvying down the agreed-upon price . . . . This . . . would be bad faith, not because any provision of the contract was unreasonable and had to be reformed but because a provision had been invoked dishonestly to achieve a purpose contrary to that for which the contract had been made. The same would be true here, we may assume, if . . . the Cookie Company had tried to appropriate the value [the Sigels] had created by canceling the franchise on a pretext . . . utterly trivial violations of the contract that the company would have overlooked but for its desire to

take advantage of the Sigels' vulnerable position. (Citations omitted.)

Under this interpretation of the implied covenant, Deere would be liable if it dishonestly withheld approval of a proposed assignment, but not if its decision was simply unreasonable. This interpretation is consistent with Garrett's adoption of the U.C.C. standard, "honesty in fact." It is inconsistent with the district court's imposition of a duty to act "reasonably."[7]

We are frankly uncertain whether the Supreme Court of South Dakota would hold that the implied covenant may not restrict an unlimited contractual right of approval, following cases such as Grand Light & Supply and James v. Whirlpool, or whether it would follow the above-quoted Seventh Circuit decisions and hold that the implied covenant does bar dishonest

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[7] The district court instructed the jury that the implied covenant required Deere "to act fairly and reasonably," and that "[s]ubterfuge and evasions violate the obligation of good faith...even though the actor believes its conduct to be justified." These instructions erroneously expanded the implied covenant far beyond "honesty in fact." In particular, the instruction regarding "subterfuge and evasions" has no place in a case of this kind. Deere's dealer strategies and its evaluation of Interstate's financial statements involved sensitive business information. The court should not have permitted the jury to find Deere guilty of "subterfuge and evasions" because it failed to disclose such information when it disapproved the assignment to Interstate.

exercise of an otherwise absolute right to disapprove. But we need not resolve that uncertainty in this case because Midcon presented no evidence that Deere acted dishonestly when it disapproved the proposed assignment to Interstate.

Midcon's case was built upon pretext and unreasonableness. Deere's stated reason for disapproving -- Interstate's inadequate equity capital -- and the alleged secret reason -- a long term plan to consolidate dealerships in the hands of key dealers -- are both legitimate business reasons for not approving Interstate as Midcon's successor. Midcon had no evidence of Deere's "dishonesty in fact" -- an intent to take "opportunistic advantage" of Midcon's need to sell for any reason other than Deere's business interests in choosing its dealers, interests expressly protected in thecontract. Thus, Deere is also entitled to judgment as a matter of law under this interpretation of the implied covenant.

C.

The district court relied upon Larese v. Creamland Dairies, Inc., 767 F.2d 716 (10th Cir. 1985), for its conclusion that the implied covenant imposed a duty on Deere to act reasonably. In Larese, a franchise agreement prohibited assignment "without the prior written consent of" Creamland and declared any unapproved transfer "null and without effect." Id. at 717. Applying Colorado law, the court held that the implied covenant required that thefranchisor not unreasonably withhold consent. In a passage quoted approvingly by the district court, the court in Larese opined that "the franchisor must bargain for a provision expressly

granting the right to withhold consent unreasonably, to insure that the franchisee is put on notice." Id. at 718. We disagree.

The normal meaning of the approval clause in the Deere-Midcon agreement is that Deere has an unrestricted right to withhold approval, at least if it acts honestly. As review of any contract drafting treatise will confirm, if the parties to a contract agree that the discretion granted under such an approval clause should be more limited, their draftsman will insert a provision stating that "consent to assignment shall not be unreasonably withheld," like the contract at issue in Anheuser-Busch, Inc. v. Natural Bev. Distribs., 69 F.3d 337, 345 (9th Cir. 1995). See generally R.A. Feldman, Drafting Effective Contracts: A Practitioner's Guide §§ 5-J.2[a] (1996 Supp.). Unlike litigation, drafting a contract is a positive exercise among parties contemplating beneficial, harmonious relations. No experienced draftsman would think of inserting a provision to the effect that "this clause permits Party A to act unreasonably." Thus, we decline to follow Larese because it would impose an unrealistic drafting burden on parties who intend to create an unrestricted approval clause whose exercise will not be supplanted by a jury's notion of reasonableness.

"[I]n commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves." James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344, 346 (2d Cir. 1933) (L. Hand, J.). Paul Taylor was an experienced businessman who had no justified expectation that Midcon's dealer contract would permit him to second-guess Deere's choice of Midcon's successor.

Accordingly, Midcon's claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law under any reasonable application of the implied covenant defined in Garrett.

III. The Wrongful Cancellation Claim.

Midcon argues that the district court erred in summarily dismissing, without discovery, its claim that Deere cancelled the dealer contract in violation of S.D.C.L. §§§§ 37-5-3 and 37-5-4. Section 37-5-3 provides that a construction equipment manufacturer may not "unfairly, without due regard to the equities of the dealer and without just provocation . . . cancel the franchise of any dealer." Section 37-5-4 creates a cause of action for damages resulting from a wrongful cancellation.

Midcon argues that Deere could be found to have constructively cancelled the dealerships in early 1991 when Deere advised that Midcon was $370,000 out of trust and would be terminated if the dealerships were not sold within eighteen months. However, Midcon's brief acknowledged that it continued to be an active Deere dealer until June 1992 when the businesses were sold to Midwest and Swaney.[8] Indeed, Midcon could take no

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[8] Midcon has no authority for its constructive cancellation theory. It cites Groseth Int'l, Inc. v. Tenneco, Inc., 410 N.W.2d 159 (S.D. 1987), but there the dealer's franchise was in fact canceled. Unlike the dealer in Groseth, Midcon continued to serve as a Deere dealer after the "constructive cancellation" and was able to sell on-going businesses. See also Zeno Buick-GMC, Inc. v. GMC Truck and Coach, 844 F. Supp. 1340, 1351 (E.D. Ark. 1992) (Kansas statute does not apply to

other position if it wished to pursue its implied covenant claim because termination of the dealerships would have destroyed Midcon's power to assign them. The plain language of §§ 37-5-3 limits its scope to instances of "unfair cancellation." In these circumstances, the district court properly perceived the factual inconsistency in Midcon's claims and dismissed a wrongful cancellation claim that was fundamentally at odds with the events at issue.[9]

The judgment of the district court is reversed and the case is remanded with instructions to enter a judgment in favor of defendants dismissing all of Midcon's claims.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent.

I believe that the court today takes a far too narrow view of South Dakota law with respect to Deere's refusal to approve the purchasers of Midcon's business.

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constructive franchise terminations), aff'd, 9 F.3d 115 (8th Cir. 1993); Carlock v. Pillsbury Co., 719 F. Supp. 791, 852 (D. Minn. 1989) (no "constructive termination" claim under Washington Franchise Investment Protection Act).

[9] Midcon's reply brief asserts for the first time that Midcon is entitled to pursue a claim that Deere violated S.D.C.L. § 37-5-2 by threatening cancellation. However, this claim was not pleaded in Midcon's complaint nor raised in its notice of cross-appeal.

I must first say that were we considering adoption of a federal rule with respect to the covenant of good faith, I would join much of the court's opinion today with substantial enthusiasm. The issue, however, is far more narrow; namely, a prediction of the rule that would be applied by the South Dakota Supreme Court.

The two district judges involved in this case denied motions for summary judgment with respect to the implied covenant of good faith issue. The first such decision was articulated in open court after considerable argument, relying on this court's earlier decision in Cambee's Furniture, Inc. v. Doughboy Rec., Inc., 825 F.2d 167 (8th Cir. 1987), based on South Dakota law.

The second judge, in a thoughtful and detailed analysis of several South Dakota cases on the implied covenant of good faith undertaken by the court, concluded:

> In this case, the implied covenant of good faith and fair dealing arises from the language of the assignment clause expressly stated in the written dealership agreements. See Nelson v. Web Water Dev. Ass'n, Inc., 507 N.W.2d 691, 698 (S.D. 1993) (reversing grant of summary judgment on issue of breach of contractual good faith and fair dealing where high court determined a valid employment contract existed). Cf. Garrett [v. BankWest, Inc.,] 459 N.W.2d [833,] 844 [(S.D. 1990)], (holding that no implied covenant arose because no contracts existed). Although the South

> Dakota Supreme Court has not decided a similar case, this Court concludes, based on Nelson, Garrett and Groseth [Int'l, Inc. v. Tenneco, Inc., 410 N.W.2d 159 (S.D. 1987)], that, construing the contract language used here, the South Dakota Supreme Court would impose on the franchisor a duty to act reasonably in deciding whether consent to a proposed dealership transfer. See Larese, 767 F.2d [716,] 716-17 [(10th Cir. 1985)].

The court continued, reasoning that there was no evidence that the assignment clause resulted from arms-length negotiation between the parties. In addition, Taylor testified in his deposition that long after the agreements were reached, Deere executive, Gene Griffith, had told Taylor "several times" that he would not be unreasonable about [approving or disapproving transfer of the dealership agreements]. The district judge stated:

> [U]nder the contract language as written, the implied covenant of good faith and fair dealing is necessary as an aid to interpreting the assignment clause. Plaintiff Midcon had a reasonable expectation that defendant would exercise good faith and fair dealing in making its decision as to whether dealership agreements could betransferred.

Later, in ruling on post-trial motions, the district judge referred to the earlier order on the motion for

summary judgment and ordered that the judgment should stand. It rejected Deere's argument that the reasons it gave for not approving Interstate as a purchaser presented questions of law rather than questions of fact. The judge, viewing the evidence in the light most favorable to the plaintiff, held there was sufficient evidence from which the jury could find that Deere's actions were not reasonable.

The jury was instructed that the obligation of good faith and fair dealing is implied in the expressed written terms of the contract, which provided that Midcon could not transfer its dealership agreements to another dealer "without the express written consent of Deere Industrial." The instruction continued:

> The implied obligation of good faith and fair dealing required Deere Industrial to exercise good faith toward Midcon and to act fairly and reasonably when Midcon requested Deere Industrial's permission to assign its dealership agreements in connection with the sale of Midcon to Interstate Companies.
>
> Good faith means honesty in fact in the conduct or transaction concerned.
>
> Subterfuges and evasions violate the obligation of good faith in performance of a contract even though the actor believes its conduct to be justified.

The jury was further instructed that Deere was entitled to exercise its business judgment, and that error

in business judgment was not sufficient to establish lack of good faith and fair dealing.

The court's opinion today first makes reference to the Garrett case and its adoption of the implied covenant of good faith, but then proceeds to loose a volley of federal cases from other circuits and other districts holding that the implied covenant did not restrict an employer's freedom to terminate an employee at will, or to terminate a contract. Next, the court's opinion refersto cases dealing with the no-assignment-without-approval clauses that are based on law from states other than South Dakota.

Finally, the court considers two Seventh Circuit cases, Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990), and Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273 (7th Cir. 1992), slip. op. at 9, both based upon Illinois law, that involve exercise of a contractual right to disapprove assignment of a dealer contract. From Cookie, the court reasons that the Seventh Circuit's interpretation of Illinois law would point to liability if Deere dishonestly withheld approval of the proposed assignment, but not if the withholding of approval was simply unreasonable. It concludes that this interpretation is consistent with the adoption of the U.C.C. standard in Garrett v. Bankwest, Inc., 459 N.W. 2d 833, 841 (S.D. 1990), which is "honesty in fact," but is inconsistent with the district court's imposition of a duty to act reasonably. Because it concludes that Midcon presented no evidence that Deere acted dishonestly when it disapproved the proposed assignment, it reverses the district court.

Notably, the court treats Garrett in a most cursory fashion, paying no heed to Garrett's discussion of the basis of the adoption of the good faith rule, and in part coupling Garrett with reference to termination of at-will employment, which is inapposite. By failing to carefully examine the foundation on which Garrett sits, and by failing to consider other relevant South Dakota precedent, however, the court fails to focus on the central issue of the case -- whether the South Dakota courts would interpret the covenant of good faith to incorporate acting reasonably.

The court today concedes that the South Dakota courts have not provided a clear answer to the issue before us. Nonetheless, there is no question but that in this diversity case we must apply the law of South Dakota, and if the issue has not been decided by its courts, our obligation is to predict the manner in which the issue will be decided.

The district court pointed to Garrett, which is the first decision that explicitly adopted the implied covenant of good faith. Garrett referred not only to the provisions of the U.C.C.,§§ 1-203 as adopted by South Dakota,[10] but also made numerous references to the Restatement (Second) of Contracts SS 205 (1981).

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10 "Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement." S.D. Codified Laws §§57A-1-203 (1988). Good faith is defined as "honesty in fact in the conduct or transaction concerned." S.D. Codified Laws §§57A-1-201 (1988).

Garrett stated:

> Good faith is derived from the transaction and conduct of the parties. Its meaning varies with the context and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Restatement (Second) of Contracts, [§§ 205], Comment a. But good faith is not a limitless duty or obligation. The implied obligation "must arise from the language used or it must be indispensable to effectuate the intention of the parties." Sessions, Inc. v. Morton, 491 F.2d 854, 857 (9th Cir. 1974).

459 N.W.2d at 841.

In its detailed analysis of the facts, Garrett quotes:

> [G]ood faith is an `excluder.' It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith. In a particular context the phrase takes on specific meaning, but usually this is only by way of contrast with the specific form of bad faith actually or hypothetically ruled out.

Id. at 845 (quoting Robert S. Summers, Good Faith in General Contract Law and the Sales Provision of

the Uniform Commercial Code, 54 Va. L. Rev. 195, 201 (1968)). Garrett continues:

> Professor Summers suggests some categories to identify bad faith in performance of a contract including: evasion of the spirit of the deal; abuse of power to determine compliance; and, interference with or failure to cooperate in the other party's performance. [Summers at 201.] Restatement (Second) of Contracts, [§§ 205] Comment e. And, as noted in Sessions, Inc. v. Morton, supra, the good faith must arise from the language used or be indispensable to effectuate the intention of the parties.

Id. Garrett held that, though every contract contains an implied covenant of good faith, there had been no violation of the covenant because there had been no violation of the spirit of the contract or justified expectations of the parties, and no abuse of power todetermine compliance, nor failure to cooperate in the performance.

Id. at 846.

Nelson v. Web Water Dev. Ass'n, 507 N.W.2d 691, 698 (S.D. 1993), is further evidence that the South Dakota Supreme Court will continue to apply the doctrine of implied good faith as it did in Garrett. Nelson directly quoted Garrett's definition of the implied covenant of good faith and fair dealing and again referred specifically to the Restatement of Contracts. See

507 N.W.2d at 698. The district court referred to and relied on both Nelson and Garrett in its determination that the reasonableness of Deere's actions is a good faith issue.

Because of the Supreme Court of South Dakota's consistent reliance on the Restatement (Second) of Contracts, I am persuaded that the court would look further to the Restatement in ascertaining whether reasonableness falls within the definition of good faith. The lengthy definition given to good faith in Garrett was not considered to be all-inclusive. Indeed, Garrett stated that the meaning of good faith "varies with the context and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Garrett, 459 N.W.2d at 841. The Restatement of Contracts phrases the duty as one of good faith and fair dealing in the performance and enforcement of the contracts. Restatement §§ 205 comment a, in discussing the meaning of good faith, refers to honesty in fact, but continues:

> Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.

Restatement (Second) of Contracts §§ 205 cmt. a (emphasis added).

Comment e, specifically referred to in Garrett, further defines the obligation of good faith in the enforcement of contracts. The obligation of good faith "also extends to dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party to extort a modification of a contract for the sale of goods without legitimate commercial reason." Restatement (Second) of Contracts §§ 205 cmt. e.

Finally, it must be observed that the court instructed the jury to consider not only whether Deere had acted fairly and reasonably with Midcon concerning permission to assign, but also that subterfuges and evasions violate the obligation of good faith. This instruction is directly supported by Comment d of the Restatement:

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further; bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which had been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. Restatement (Second) of Contracts §§ 205 cmt. d.

I believe that the district court did not err in concluding from Nelson and Garrett that their reliance on section 205 of the Restatement of Contracts would support the conclusion that reasonableness, along with subterfuges and evasions, all terms enumerated in the Restatement comments, are issues properly to be considered by the jury in determining the issue of good faith.

Further, the district court's reliance on Garrett and Nelson, and in turn the reference of those two cases to section 205 of the Restatement of Contracts, supports the district court's reference to Larese, contrary to the extended arguments made by the court today.

While the court's comments today concerning the ruling on Midcon's motion in limine to preclude evidence regarding Midcon's sales out of trust and Deere's intended termination may be but dictum in view of its holding, just a few words are in order to explain why I believe the court also errs in this respect. Midcon's claim was pleaded in six counts. The district court dismissed five of these counts, including that for wrongful termination, at Deere's urging. At the hearing on this motion, Deere's counsel argued that no cancellation of the franchise had been alleged, but only "that Deere said you should find someone else to buy your business or we will terminate. We never got to the we will terminate part, because he did, in fact, find someone else to buy his businesses." Counsel continued to advocate that what had happened in this case was the resignation of a dealer after a buyer was found. Thus, the sole issue that was tried to the jury was the question of the implied covenant of good faith on refusal to approve the assignment. The

district court explained that it excluded the evidence because it was prejudicial in light of the fact that Midcon's wrongful termination claim had been dismissed. In denying the post-trial motion for new trial on this ground, the district court referred to this order in the pretrial motions, and stated that Deere had provided no new evidence or argument to justify a reversal of these rulings and therefore denied relief. The trial judge has wide discretion in ruling on the admissibility of evidence, and its decisions thereon will not be disturbed unless there is a clear and prejudicial abuse of discretion. Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342, 1346 (8th Cir. 1991), cert. denied, 114 S.Ct. 2120 (1994).

I would not conclude that the district court abused its discretion in this matter.

I would affirm the judgment of the district court because I believe it to be based firmly on South Dakota law and an accurate prediction as to how South Dakota courts would decide the issue before us.

A true copy.

Attest:

CLERK, U. S. OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV 93-4069

TAYLOR EQUIPMENT, INC., f/k/a TAYLOR EQUIPMENT RENTAL COMPANY, INC., d/b/a/ MIDCON EQUIPMENT COMPANY,

Plaintiff,

-vs-

JOHN DEERE COMPANY, a Delaware corporation and JOHN DEERE INDUSTRIAL MACHINERY COMPANY, a wholly owned subsidiary,

Defendants.

JOHN DEERE INDUSTRIAL EQUIPMENT COMPANY,

Counterclaimant,

-vs-

TAYLOR EQUIPMENT, INC., PAUL E. TAYLOR, AND CECELIA L. TAYLOR,

Defendants to Counterclaim.

ORDER ON POST-TRIAL MOTIONS AND DIRECTING ENTRY OF FINAL JUDGMENT ON COUNT III

Defendants John Deere Company and John Deere Industrial Machinery Company move for judgment as a matter of law under Federal Rule of Civil Procedure 50 (b) or alternatively for a new trial under Federal Rule of Civil Procedure 59, and for entry of final judgment on Count III of plaintiff's complaint. Plaintiff responded, and the Court has carefully considered the briefs filed by the parties.

In ruling on a post-verdict motion for judgment as am matter of law, the Court must consider whether there is sufficient evidence to support the jury verdict. McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1400 (8th Cir. 1994). The Court must view the evidence in the light most favorable to the prevailing party, in this case plaintiff, and the Court must not engage in weighing or evaluating evidence or determine questions or credibility. Id. "Judgment as a matter of law is appropriate only when all of the evidence points one way and is 'susceptible of no reasonable inference sustaining the position of the nonmoving party.'" Id. (quoting White v. Pence, 961 F.2d 776, 779 (8th Cir. 1992)).[11]

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[11] Because there is some question whether the federal or state standard of review applies in a diversity case, the Court finds that it need not resolve the issue because the federal standard is virtually identical to the South Dakota standard. Compare White, 961 F. 2d at 779 (court must view the evidence "in the light most favorable to the prevailing party") with Westover v. East River Elec. Power Coop., Inc., 488 N.W. 2d 892, 896 (S.D. 1992) (court must examine evidence "in the light most favorable to the non-moving party").

Defendants first argue that the Court erred as a matter of law in submitting to the jury plaintiff's claim of breach of an implied covenant of good faith and fair dealing. The Court disagrees with defendants' view of the law, a explained in the October 14, 1994 Memorandum Opinion and Order denying defendants' motion for summary judgment on Count III of plaintiff's complaint. The Court reaffirms that prior legal ruling and denies relief from judgment on this argument.

Defendants next argue that the reasons given by them for not approving Interstate as a purchaser of Midcon were objectively reasonable and, as a matter of law, cannot support a finding of lack of good faith. The reasonableness of defendants' stated reasons is not a question of law, but rather the primary factual issue that the jury was asked to decide. Viewing the evidence in a light most favorable to plaintiff, there was sufficient evidence from which the jury could find that Deere Industrial's action were not reasonable. The evidence did not point one way in favor of defendants. See McKnight, 36 F. 3d at 1400. Thus, relief is denied on this argument.

Defendants challenge several of the Court's evidentiary rulings. They argue that they should have been permitted to introduce evidence: (1) that Midcon was out of trust, subjecting its dealership agreements to termination; (2) that Midcon had defrauded Deere Industrial in its government equipment program; and (3) that Interstate was in a precarious financial situation after October 1991. Before trial, the Court ruled from the bench during a motions hearing and in a follow-up June 14, 1994 Order that defendants could not introduce evidence as to the first matter because plaintiff's other claims, including wrongful termination, had been

dismissed and the evidence would be prejudicial to plaintiff. The Court also ruled that defendants could not introduce evidence as to the second matter because Deere Industrial did not have information about discrepancies in the governmental discount program at the time it refused to approve Interstate as a buyer of Midcon. Consequently, Deere could not have been motivated by this information in making its decision. For these reasons, the Court excluded evidence on these matter from the jury trial of plaintiff's claim and bifurcated the court trial on defendants' counterclaim to avoid prejudice to plaintiff. As to the third area, the Court ruled at trial that Intestate's financial condition after October 1991 was not relevant, as that information could not have had any influence on Deere's decision in August 1991 to disapprove Interstate. Defendants provide no new evidence or argument to justify a reversal of these rulings. Relief is denied as to these arguments.

Defendants also argue that the damages award should be set aside or reduced because damages should have been calculated from December 15,1991, rather than from October 1, 1991, and damages awarded by the jury for lost rent and the covenant not to compete were not supported by the evidence. The Court rejected these arguments in its May 5, 1995 Order Awarding Prejudgment Interest On Jury Verdict, and the Court reaffirms that ruling. Relief is denied on these arguments.

Defendants alternatively move for a new trial under Rule 59(a). The Court must consider whether a new trial should be granted to avoid a miscarriage of justice. McKnight, 36 F. 3d at 1400. Defendants offer six grounds for granting a new trial, none of which establish

that a miscarriage of justice has occurred. The Court finds that the jury verdict is not contrary to the clear weight of the evidence, there was sufficient evidence to support the jury verdict, the verdict is not duplicative and excessive, the jury was properly instructed, the Court did not err in granting plaintiff's motion to bifurcate trial of plaintiff's claim and defendants' counterclaim, and the Court did not err in denying defendants leave to amend their answer to assert as defenses the same matters the Court had previously excluded from the jury trial through bifurcation and by granting plaintiff's motion in limine. the Court finds no basis to grant a new trial.

Finally, defendants request entry of final judgment on Count III under Federal Rule of Civil Procedure 54 (b) for purposes of immediate appeal, and plaintiff does not resist. The Court finds that there is no just reason for delay of defendants' appeal and therefore expressly directs that the Partial Judgment entered by the Clerk on May 5, 1995, is the final judgment of the Court on Count III of plaintiff's complaint. An Amended Judgment will be filed with this Order, however, to include an award of costs to plaintiff, to be determined and taxed by the Clerk.[12] Accordingly,

IT IS ORDERED:

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[12] The Court notes that defendants' timely filing and service of its post-judgment motions within ten days after entry of the Partial Judgment tolled the time for appeal under Federal Rule of Appellate Procedure 4 (a) (4). Defendants' time for appeal will run from the date this Order and the Amended Judgment is entered on the docket.

(1) that defendants' Motion for Judgment As A Matter Of Law, Or In The Alternative, For A New Trial is denied. (Doc. 180).

(2) that defendants' Motion For Entry Of Final Judgment On Count III Of Plaintiff's Complaint is granted. (Doc. 182.)

Dated this 26th day of June, 1995.

BY THE COURT:

_____
Laurence L. Piersol
United States District Judge

ATTEST:

William F. Clayton, Clerk

BY:_____
Deputy
(Seal)

don't make any claim based upon those acts. Our claims are based on what happened -- our fraud claims are based on what happened in 1991. And I think that is what his position is. And actually, maybe I am confused now about what his position is on that. I think the statute has run on the 1974 and 1978 acts. That's all I have , Your Honor.

THE COURT: Well, it's the view of the Court that -- the viewing the great volumes of paper submitted by both sides and the record in this case, that it's filled with essence. This complaint asserts that the John Deere Company wrongfully refused to approve Interstate as a buyer of the plaintiffs' dealerships. And that the claims made to the six causes of action pled are -- appear to me to be an effort to bolster that claim. And I think this pleading, that the complaint in this case illustrates a problem when you try to plead a lot of facts in a complaint that -- that a cause of action can be obscured by a lot of extraneous material which doesn't have anything to do with the issue.

It's the Court's view that reasonably construing the complaint that it alleges that the breach of contract, in that it alleges, it seems to me, that the defendant wrongfully refused to approve Interstate, whether they -- whether this can be proven or not, obviously remains to be seen. But with regard to the defendants' motions, it's the Court's view that the motion should be granted as to causes of action Numbers 1, 2, 4, 5, and 6. It being the view of the Court that the record is sufficiently complete to determine whether or not these causes of action exist. And that it's the view of the Court that no future discovery is going to establish a basis for resisting the defendants' Motion for Summary Judgment as to these claims.

While the Cambee court did state and does state that there is no independent action for a breach of the implied covenant of good faith and fair dealing ,that the Court -- the Eighth Circuit did reverse me in that case on the basis that there was an issue as to whether or not in interpreting the contract, the good faith and the fairness existed. And I think the same principles of law, enunciated by the Cambee court, entitles the plaintiff in this case to -- to establish if it can, whether or not the John Deere breached the covenant, the implied covenant of good faith and fair dealing in refusing to approve Interstate as an assignee of the Deere distributorships in Sioux Falls and Sioux City. Therefore, the motion dismiss Count 3, or the Motion for Summary Judgment on Count 3 will be denied.

Now, we will proceed to do Rule 16 scheduling conference. And how much time does the plaintiff think is required for discovery here in this case?

MR. JOHNSON: We would think approximately six months, Your Honor.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV 93-4069

TAYLOR EQUIPMENT, INC., f/k/a TAYLOR EQUIPMENT RENTAL COMPANY, INC., d/b/a/ MIDCON EQUIPMENT COMPANY,

Plaintiff,

-vs-

JOHN DEERE COMPANY, a Delaware corporation and JOHN DEERE INDUSTRIAL MACHINERY COMPANY, a wholly owned subsidiary,

Defendants.

JOHN DEERE INDUSTRIAL EQUIPMENT COMPANY,

Counterclaimant,

-vs-

TAYLOR EQUIPMENT, INC., PAUL E. TAYLOR, AND CECELIA L. TAYLOR,

Defendants to Counterclaim.

MEMORANDUM OPINION AND ORDER

Pending before the Court is defendant's motion for summary judgment on the remaining count III that defendant breached an implied duty of good faith and fair dealing in refusing to approve the sale of Midcon Equipment Company's John Deere dealerships in Sioux Falls, South Dakota, and Sioux City, Iowa, to Interstate, Inc. The Court heard argument on the summary judgment motion and has considered the supplemental materials filed by the parties following the motions hearing and pretrial conference. For the reasons discussed below, the Court denies defendant's motion for summary judgment.

At issue in count III is an assignment clause contained in each of the eight John Deere Industrial Dealer Agreements executed by defendant John Deere Industrial Equipment Company and plaintiff Taylor Equipment Rental Company, Inc., d/b/a Midcon Equipment Company. Each assignment clause states: "This Agreement cannot be assigned by the Dealer without prior written consent of the Company." (Doc. 9, Exs. A-H.) It is undisputed that defendant acted under this clause of the agreements when it denied approval of the sale of Midcon's dealerships to Interstate. Plaintiff claims that defendant's disapproval of the sale to Interstate. Plaintiff claims that defendant's disapproval of the sale to Interstate and the forced sale to other companies at a lower price breached the implied covenant because the reason defendant gave for disapproving the sale--Interstate's capital and organizational structure--was pretextual. Plaintiff alleges that defendant actually refused to approve the sale to further other improper motives.

Defendant argues in support of its summary judgment motion that the implied covenant of good faith and fair dealing may be used as an aid to contract interpretation, citing Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F. 2d 167 (8th Cir 1987), but that it may not be used to override explicit contractual terms, or to create or add to the contractual obligations to which the parties have expressly agreed, citing Williams v. Jader Fuel Co., 944 F. 2d 1388 (7th Cir. 1991), cert. denied, 112 S. Ct. 2306 (1992), and Grand Light & Supply Co. v. Honeywell, Inc., 771 F 2d 672 (2d Cir. 1985). Defendant argues that the assignment clause vests it with an unqualified right to approve or disapprove the transfer of its dealer agreements, and that the implied covenant of good faith and fair dealing cannot erode its express contractual right to make the ultimate dealership transfer decision, citing James v. Whirlpool Corp., 806 F. Supp 835 (E.D. Mo. 1992).

Even if an implied covenant applies in this case, defendant argues that the covenant's purpose is limited to protecting plaintiffs' reasonable expectations under the terms of the dealer agreements, citing Big Horn Coal Co. v Commonwealth Edison Co., 852 F. 2d 1259 (10th Cir. 1988). Defendant argues that plaintiffs could not have reasonably expected that defendant would act in any particular way in approving or disapproving a successor dealer. Thus, defendant argues that plaintiff cannot state a claim against it. Even if Midcon can state a claim for breach of an implied covenant, defendant argues that the affidavits of Midcon's experts are conclusory and thus no genuine issue of material fact exists for trial. Finally, defendant argues that the Court should dismiss the individual plaintiffs, Paul and Cecelia Taylor ,because

they were not parties to the contract between it and Midcon.

Plaintiffs argue that defendant's motion should be denied as barred by the law of the case doctrine because Judge Jones previously dneied defendant's earlier summary judgment motion ruling that count III states a viable claim under Cambee's Furniture, Inc. If the Court rejects the preceding argument and considers the pending motion, plaintiffs argue that defendant was required to act in good faith and in a commercially reasonable manner when Midcon sought to transfer its rights under the dealership agreements to Interstate, citing Larese v. Creamland Dairies, Inc., 767 F. 2d 716, 717 (10th Cir. 1985). Plaintiffs argue that South Dakota law imposes an implied covenant of good faith and fair dealing in every contract, citing Garrett v. bankwest, Inc., 459 N.W. 2d 833, 841 (S.D. 1987), appeal after remand, 440 N.W. 2d 276 (S.D. 1989). Plaintiffs also argue that a genuine issue of material fact exists for trial as to whether defendant exercised good faith and fair dealing. Plaintiffs argue that the evidence in the record, particularly the opinions of plaintiffs' experts Kelly Walker and Jerry Noonan, as set out in their affidavits, shows that Interstate was financially strong and an appropriate buyer for Midcon's dealerships. Thus, plaintiffs argue, a jury should be allowed to decide whether defendant exercised good faith and fair dealing in g iving a pretextual reason for disapproving the sale to Interstate.

Defendant responds that the law of the case doctrine applies only to final judgments, Lovett v. General Motors Corp., 975 F. 2d 518 (8th Cir. 1992), and therefore, its motion is not barred. At the direction of the Court, counsel for the parties have now filed

documentary evidence cited in their statements of material facts. The Court has considered these filings, along with the supplemental affidavit of Kelly Walker. Counsel have provided the Court with copies of McKinney v. Anheuser-Busch, Inc., 2 Bu. Franchise Guide (CCH) Par. 10,454 (N.D. Cal. May 24,1994), and its companion case, Anheuser-Busch, Inc. v. Natural Beverage Distributors, 151 F.R.D. 346 (N.D. Cal. 1993).

The Court holds that this motion for summary judgment is not barred by the law of the case doctrine. The September 16, 1993 Order filed by Judge Jones granting in part and denying in part defendant's previous motion for summary judgment was not a final judgment on count III that would permit the Court to apply the law of the case doctrine to this motion. See Lovett, 975 F.2d at 522. The Court is free to consider the pending motion for summary judgment and to take the view it deems warranted by the law and the evidence presented. See id. The Court dismisses the individual plaintiffs from count III, as they were not parties to the contracts between plaintiff Midcon and defendant Deere Industrial. See Plowman v. United States Dept. of Army, 698 F. Supp. 627, 631 (E.D. Va. 1988) (holding plaintiff's claim that defendants breached an implied covenant of good faith and fair dealing could derive only from contract and no contract existed).

Because the dealership agreements at issue here do not contain a choice of law clause, the Court will apply the substantive law of South Dakota. The parties do not argue that the Court should do otherwise.

As plaintiff Midcon argues, under common law, "[e]very contract contains an implied covenant of good

faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract." Garrett, 459 N.W. 2d at 841; Groseth, 410 N.W. 2d at 169 (observing that, since the decision in Arnott v. American Oil Co., 609 F. 2d 873 (8th Cir. 1979), "most courts have refused to impose upon the franchise relationship anything more than a duty of good faith."); Cambee's Furniture, Inc., 825 F.2d at 174-75 (observing that South Dakota law permits consideration of good faith as an aid to contract interpretation). The concept is also written into the Uniform Commercial Code (U.C.C.) Sec. 1-203, which i set out in South Dakota statutes at S.D. Codified Laws Ann. Sec. 57A-1-203:

> Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement.

See also Garrett, 459 N.W. 2d at 841. "'Good faith' is defined as ' honesty in fact in the conduct or transaction concerned.'" Id. (quoting S.D. Codified laws Ann. Sec. 57A-1-201(19)). Application of this implied covenant allows "an aggrieved party to sue for breach of contract when the other contracting party, by his lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain." Id. The implied duty of good faith is not limitless, however. Id. the implied covenant must arise from the language used in the contract or its must be indispensable to carry out the intention of the parties. Id.

In this case, the implied covenant of good faith and fair dealing arises from the language of the assignment clause expressly stated in the written

dealership agreements. See Nelson v. Web Water Dev. Ass'n, Inc., 507 N.W. 2d 691, 698 (S.D. 1993) (reversing grant of summary judgment on issue of breach of contractual good faith and fair dealing where high court determined a valid employment contract existed). Cf. Garrett, 459 N.W. 2d at 844 (holding that no implied covenant arose because no contracts existed). Although the South Dakota Supreme Court has not decided a similar case, this Court concludes, based on Nelson, Garrett, and Groseth, that, construing the contract language used here, the act reasonably in deciding whether to consent to a proposed dealership transfer. See Larese, 767 F.2d at 716-7 (holding, where Colorado courts had not ruled, that good faith applied where assign, transfer or sublet this franchise, or any of [the] rights under this agreement, without the prior written consent of Area Franchisor [Creamland] and Baskin Robbins, any such unauthorized assignment, transfer or subletting being null and without effect.'").

The Court finds that the assignment clause does not give Deere an unqualified right to approve or disapprove the transfer of the dealership agreements. Deere does not direct the Court to evidence showing that the assignment clause resulted from arms length negotiation between Deere and plaintiff at the time the agreements were executed. See Larese, 767 F.2d at 718. Paul Taylor testified at his deposition that, at a time long after the agreements had been executed, Deere executive Gene Griffith told him "several times that he would not be unreasonable about [approving or disapproving transfer of the dealership agreements]." Taylor Dep. at 179. If the assignment clause contained additional language, such as, "which consent may be withheld for any reason at all" or "no reason need be given for

withholding such consent.," then an unqualified right to refuse consent could arise in the absence of other countervailing considerations. However, under the contract language as written , the implied covenant of good faith and fair dealing is necessary as an aid to interpreting the assignment clause. Plaintiff Midcon had a reasonable expectation that defendant would exercise good faith and fair dealing in making its decision as to whether dealership agreements could be transferred. Thus, the Court holds, as a matter of law, that plaintiff states a claim for breach of the implied covenant of good faith and fair dealing.[13]

The Court must grant defendant's motion if there are no genuine issues of material fact for trial and defendant is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). The Court must non-moving party, and give it the benefit of all reasonable factual inferences. See Robinson v. Monaghan, 864 F. 2d 622, 624 (8th Cir. 1989). The Court holds that the affidavits of plaintiff's experts, Walker and Noonan, are substantive and not conclusory, as defendant argues. The experts are qualified to state their opinions, and with Midcon attorney Bruce Crary's deposition and other evidence of

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[13] while Anheuser-Busch, Inc.and McKinney are generally helpful to the Court's analysis, these cases are distinguished because of the marked difference in the applicable contract language. There, the franchise agreement provided that transfer required prior approval of Anheuser-Busch, but that such approval "shall not be unreasonably withheld." McKinney, 2 Bus. Franchise Guide (CCH) Par. 10, 454 at 2. No such language is included in the assignment clause at issue here.

record, establish that a genuine issue of material fact exists for trial as to the actual financial structure and strength of Interstate and whether defendant breached the duty of good faith and fair dealing by asserting such weaknesses as a pretext to block Midcon's proposed sale to Interstate. Accordingly,

IT IS ORDERED that the individual plaintiffs, Paul and Cecelia Taylor, are dismissed from count III.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is denied. (Doc. 87.)

Dated this 14th day of October, 1994.

BY THE COURT:

_____
Lawrence L. Piersol
United States District judge

ATTEST:
WILLIAM F. CLAYTON CLERK

BY:_____
DEPUTY
(SEAL)

No. 95-2937
No. 95-3000SDSF

Taylor Equipment, Inc.,
doing business as Midcon
Equipment Company,

Plaintiff-Appellee/
Cross Appellant,

v.

Order Denying
Petition for
Rehearing and
Suggestion for
Rehearing En Banc.

John Deere Company; John Deere
Industrial Equipment Company,

Defendants-Appellants/
Cross Appellees.

The suggestion for rehearing en banc is denied.
The petition for rehearing by the panel is also denied.

November 26, 1996

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit